

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: CAPITAL ONE CUSTOMER . Civil Action No. 1:19md2915
DATA SECURITY BREACH .
LITIGATION, . Alexandria, Virginia
August 14, 2020
11:05 a.m.

.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOHN F. ANDERSON
UNITED STATES MAGISTRATE JUDGE
(Via ZoomGov Video Conference)

APPEARANCES:

FOR THE PLAINTIFFS:

NORMAN E. SIEGEL, ESQ.
Stueve Siegel Hanson LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
and
JOHN A. YANCHUNIS, SR., ESQ.
Morgan & Morgan
Complex Litigation Group
201 North Franklin Street
7th Floor
Tampa, FL 33602

FOR CAPITAL ONE DEFENDANTS:

S. STEWART HASKINS, II, ESQ.
JOHN C. TORO, ESQ.
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309-3521
and
ROBERT A. ANGLE, ESQ.
Troutman Pepper Hamilton
Sanders LLP
1001 Haxall Point, 15th Floor
P.O. Box 1122
Richmond, VA 23219

(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 32)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

APPEARANCES: (Cont'd.)

FOR AMAZON DEFENDANTS:

TYLER G. NEWBY, ESQ.
Fenwick & West LLP
555 California Street, 12th Floor
San Francisco, CA 94104

and

ROBERT R. VIETH, ESQ.
Hirschler Fleischer, P.C.
8270 Greensboro Drive, Suite 700
Tysons, VA 22102

OFFICIAL COURT REPORTER:

ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Third Floor
401 Courthouse Square
Alexandria, VA 22314
(703)299-8595

1 P R O C E E D I N G S

2 A VOICE: I can't -- can anyone hear Judge Anderson?

3 A VOICE: We can't hear the Court.

4 THE COURT: Hopefully, now I'm back. Okay. I'm
5 going to have the clerk call the case, please.

6 THE CLERK: Certainly. In re Capital One Customer
7 Data Security Breach Litigation, Civil Action No. 19md2915.

8 THE COURT: And who do I have for the plaintiffs?

9 MR. YANCHUNIS: Good morning, Your Honor. John
10 Yanchunis.

11 MR. SIEGEL: And Norman Siegel.

12 THE COURT: Who's going to argue?

13 MR. YANCHUNIS: Your Honor, I am, John Yanchunis.

14 THE COURT: Okay. Thank you.

15 And who do I have for Amazon?

16 MR. NEWBY: Your Honor, good morning. Tyler Newby of
17 Fenwick & West, and with me is Robert Vieth.

18 THE COURT REPORTER: Excuse me, Your Honor. I cannot
19 hear.

20 THE COURT: We're getting some feedback. See if we
21 can -- is that better?

22 THE COURT REPORTER: Yes.

23 THE CLERK: Yes.

24 THE COURT: Well, I'm hearing things twice.

25 A VOICE: This often happens if somebody has dialed

1 in and has a computer connection.

2 THE COURT: All right. Well, it sounds like we may
3 have gotten it resolved now, so I think it's working okay.

4 So I've got -- and who's here for Capital One?

5 MR. HASKINS: Good morning, Your Honor. Stewart
6 Haskins with King & Spalding on behalf of the Capital One
7 defendants. I also have John Toro with King & Spalding as
8 well.

9 MR. ANGLE: And Robert Angle on behalf of Capital as
10 well, Troutman Pepper.

11 THE COURT: Thank you.

12 All right. Well, I've read the various materials
13 that the parties have submitted in support of this motion to
14 compel, and I'm curious, I just need to get a little bit better
15 understanding. Typically on a motion to compel, I have a
16 discovery request and a, you know, response if one is fighting
17 over it. This is sort of just a broad-based we want text
18 messages.

19 And as I understand it, we have Amazon has designated
20 55 custodians that they have agreed to produce documents from.
21 They have now searched nine of those custodians for text
22 messages between them and Capital One, and your request has
23 various parts to it, which means that they have to go back and,
24 I assume from what you're saying, even though it's not
25 specific, is --

1 THE COURT REPORTER: I'm sorry, Your Honor --

2 THE COURT: -- every discovery request -- again,
3 we're getting a little bit of feedback, I think.

4 We have everybody else on mute, so this is going to
5 be the best we can do, I think, under the circumstances as I
6 can tell.

7 So, you know, we've got three different areas that I
8 think -- first, going back, I guess you're requesting that they
9 have to go back and for the entire 55 custodians, go back and
10 search their text messages for all discovery requests that have
11 been submitted to Amazon, and that would include not only texts
12 with Capital One employees but texts among themselves having to
13 do with any responsive material, and then texts with other
14 customers, it kind of had broken it down into those three
15 different areas, where they have done at least part of item
16 No. 1; that is, of the 55, you've gotten at least 9 that
17 they've produced the texts that they had with Capital One.

18 So again, help me understand what it really is that
19 you're asking for and why we, we should require them to go in
20 and do that type of undertaking in this case. You've got to be
21 off mute now.

22 Well, again, you're still on mute.

23 MR. SIEGEL: John, you're on mute.

24 MR. YANCHUNIS: Okay. Sorry.

25 THE COURT: Okay.

1 MR. YANCHUNIS: Thank you, Your Honor.

2 THE COURT: Start from the beginning.

3 MR. YANCHUNIS: I have many challenges, one of which
4 is technical challenges.

5 You know, I think you addressed perhaps something
6 that could have been presented for you, and I apologize for
7 this. We served a first request for production of documents
8 which is pretty lengthy, and in the description of, or
9 definition of both "communications" and "documents" would have
10 encompassed the very type of document which we seek now: text
11 messages.

12 A number of responses to those requests indicated
13 that production would occur. It wasn't until I took the
14 deposition of Mr. Schuster, who was a 30(b)(6) witness, on
15 June 11, that to my surprise, and perhaps this is generational,
16 that the communication of the breach between the chief
17 information security officer of Capital One and the chief
18 information security officer of AWS was via text, and if you
19 have the deposition in front of you, you would see a colloquy
20 where I'm actually challenging why didn't they simply pick up
21 the phone? Because this was a significant cybersecurity
22 incident involving the theft of almost 100 million personal
23 identification information of customers of Capital One.

24 So it wasn't until that time that I realized that
25 those text messages had never been produced as they had for

1 Capital One. Capital One made a production of text messages
2 with its employees, at least I believe that to be the case, and
3 I think I've even attached one of them for your review, one
4 between employees.

5 So in response -- and the motion lays this out --
6 Mr. Newby and I engaged in a communication about production,
7 and I'm not sure how the production or, or the search occurred,
8 whether it was simply a communication to the nine individuals
9 that we identified as witnesses to say: Search your text
10 messages and see if you can find any communications where you
11 were talking to somebody about any of the issues in this suit
12 and a Capital One employee, and the day before he filed the
13 motion, they indicated Mr. Bentzen was one that they had
14 identified.

15 So the request for this information was out there,
16 but this is not something new. It was new to us that it wasn't
17 produced.

18 So if you wanted to see the requests, I could send
19 those -- I could file those after today's hearing, and you can
20 see where repeatedly they indicate this information is going to
21 be produced.

22 So if you can imagine, one of the things that we hit
23 on in, in the motion is sometimes the candor or the lack of
24 guardedness that employees may have when they communicate with
25 one another, and the one I submitted in support of our motion

1 between two Capital One employees is a rather candid
2 conversation outside or inside the courthouse while Paige
3 Thompson, the alleged perpetrator of this crime, is being
4 arraigned.

5 So we made the request. The obligation was on the
6 part of AWS to produce this information. The attempt to come
7 up with a compromise occurred because I was trying to lessen
8 the burden. And quite frankly, I don't know how they made that
9 request. They raise the issue of privacy, but what was less
10 private when they approached the nine individuals to search
11 those records?

12 And quite frankly, we can address that by having the
13 mailbox searched for key terms, for keywords, so we can avoid
14 perhaps any spousal communications or other relationship
15 communications which people may not want to share or have
16 exposed to the outside world.

17 So again, they did not object, and I understand the
18 Court doesn't have that, to the production of this information
19 until, again, I took the deposition on June 11 and found out
20 they hadn't produced a text message, and then later any text
21 messages.

22 THE COURT: You had their production. The idea that
23 you didn't know that they didn't produce any text messages
24 really isn't accurate. You knew what they produced. If there
25 weren't text messages in what they produced, you knew you

1 didn't have any text messages.

2 MR. YANCHUNIS: Well, the deposition was taken on
3 June 11, Your Honor, and we were on a rolling production with a
4 substantial compliance of July 1.

5 And by the way, we're still waiting for a completion
6 of their production requirement and had Ms. Dent and an AWS
7 counsel at a communication yesterday about additional
8 production.

9 But be that as it may, if your question is, well, why
10 didn't you know that they hadn't produced it without me
11 assuming that they had found something and had honored the
12 obligation to produce it and there might not be any? So the
13 point being if there wasn't any, why couldn't I assume that
14 there wasn't any, not that there was, until again June 11, when
15 I took Mr. Schuster's deposition as a corporate representative
16 of AWS?

17 THE COURT: Going back to what is it that you really
18 want them to do in this motion?

19 MR. YANCHUNIS: Well, search the text messaging
20 communications that employees have had. And you're right,
21 there are in excess of 50 custodians. By the way, there are
22 many more on the part of Capital One.

23 And I'm not an ESI wonk, I don't have the
24 technological background other than in cybersecurity detection
25 and breaches, but I understand those messages can be searched

1 in connection with certain key terms as compared with, you
2 know, a more onerous burden.

3 But I think, Your Honor, this is a case involving not
4 only a significant amount of consumers that information was
5 taken, but the enormity of, of the repercussions of that which
6 we advocate make this proportionality argument a little thin, I
7 think.

8 And in terms of the burdensome, let me just add that
9 again, as we point out in our reply, typically courts require
10 some articulation through declaration or affidavit of what that
11 entails. We did not get that.

12 And while I certainly have sometimes told courts
13 certain things, I'm not a witness. And even still, if I'm
14 going to articulate a burden, I'm going to give you detail,
15 which we didn't get as to the time and expense and the manpower
16 or person power it would take to engage in that enterprise.
17 That wasn't done either.

18 THE COURT: All right. Mr. Newby, let me hear from
19 you. And good morning. I know it's pretty early out there on
20 the West Coast. I know you appreciated this one-hour delay
21 from ten to eleven to at least give you time to get up and have
22 breakfast.

23 MR. NEWBY: I do, Your Honor, and I didn't, I didn't
24 presume that that was for my benefit, but I thank the Court
25 for, for making that adjustment.

1 Your Honor, just to address Mr. Yanchunis's
2 statements in reverse, the -- in order to search for text
3 messages of all 55 custodians, the proportionality and burden
4 is really laid out just in the math here. We have 55
5 custodians, and you have a five-year period during which the
6 parties have agreed there is relevant information. I should
7 say five years and a month. And so you multiply that together,
8 and that's a tremendous amount of text message history from
9 personal devices to search through, which is highly burdensome
10 both from the privacy rights of those individuals --

11 THE COURT: Help me understand how it is burdensome.
12 And that's, that's, that's one of the things that's really
13 missing in your opposition. You did it, you obviously searched
14 nine custodians' text messages for responsive material. I have
15 no information in front of me as to how long, complicated,
16 extensive, what kind of an undertaking that was. So, I mean,
17 it is your burden to come in and convince me that it is not
18 proportional.

19 And, you know, this is, you know, thin at best, just
20 saying it's going to -- you know, I've got 55. Well, if it's
21 55 times, you know, some very small number or something that
22 isn't very significant in the overall scheme of things, that
23 doesn't amount to much, Mr. Newby.

24 MR. NEWBY: Well, Your Honor, the, the agreement that
25 we had tentatively reached with the plaintiffs was aimed at

1 addressing the difficulty of conducting a keyword search across
2 55 custodial phones, and here's, here's why what we did was not
3 burdensome:

4 We limited our agreement to the collection and
5 production of text messages with Capital One, and so that's a
6 very finite universe in terms of identifying the phone numbers
7 that these eight -- it's actually eight; the ninth is a former
8 employee who's, who's not under our control right now -- but
9 the -- for those eight, we could say -- we could identify the
10 specific Capital One employee phone numbers that have been
11 communicated with, and it was a very narrow universe of
12 responsive e-mail -- I mean, text messages.

13 In fact, most people did not communicate at all by
14 text message. There is Mr. Schmidt, who is the, the chief
15 information security officer and the executive sponsor, who --
16 whose position is for Capital One to be able to contact an
17 executive when they need to escalate a matter.

18 And just to correct one, one issue here, the Capital
19 One witness -- or, I'm sorry, the Capital One CISO did not text
20 Mr. Schmidt: We found the data breach. He texted him on a
21 Saturday saying: Can we get on a call? It's important, or
22 words to that effect. It's an important issue. Sorry to
23 bother you on the weekend.

24 And, and then there was a further text message
25 back-and-forth between those two over a couple of months.

1 We only had one other witness of those eight that the
2 plaintiffs requested deposed that had text communications with
3 Capital One, and so when you narrow it to who is, who is being
4 spoken with, it's a pretty easy and not burdensome production,
5 but when you ask for 55 custodians, the identification of 55
6 custodians and all of their communications with every Amazon
7 employee, anyone who might have been a customer, that requires
8 imaging their entire phones, which pulls all of the, the text
9 messages of everybody off of, including sensitive personal
10 information, and then you, then you run the keyword search.

11 So that does have a significant privacy impact on
12 these individuals. It's a dispersed workforce, where people
13 are located around the country, sometimes the world, and
14 collecting those phones and doing that imaging is substantially
15 difficult.

16 THE COURT: Well, substantially difficult, that -- I
17 don't know what that means. You know, and that, that's the
18 problem. First of all, if text messages fall within the scope
19 of what was being requested by the plaintiff, so they are
20 communications, they are memorializations of communications,
21 you know, they are like e-mails to some extent in that, you
22 know, they are communications dealing with certain things.

23 So I'm, I'm a little concerned that you just
24 completely ignored the idea that text messages would be
25 something that we should look to and need to examine, just as

1 e-mails, I mean, people, you know, use their, I assume, Capital
2 One e-mail account to, you know, send personal information to
3 people, do certain things, checking at home, those kinds of
4 things. That wouldn't be that uncommon.

5 So you're subjecting -- you know, when you look at a
6 custodian's complete e-mails, you're also capturing a lot of
7 information that is or may be a violation of the company
8 policy, still is using it for personal goods -- use.

9 So it seems like a misstep to some extent from the
10 get-go that you would not have thought to look to see whether
11 text messages would have been responsive to the document
12 requests that were served on Amazon.

13 And there's some vague reference in your opposition
14 to when we did the custodial interviews, that didn't come up.
15 I find that shocking that your firm, as experienced as it is in
16 these type matters, wouldn't have addressed that issue at the
17 beginning of a custodial interview and told them that they
18 needed to preserve that kind of information because if, in
19 fact, there were relevant text messages going on, they would
20 have an obligation to preserve it.

21 And so help me understand why we're in this situation
22 this far along in the discovery process.

23 MR. NEWBY: Your Honor, when we -- so when we
24 identified and met with custodial custodians to identify
25 sources of information, we asked them: What are -- how do you

1 communicate with Capital One? How do you communicate about the
2 Capital One account? And those -- and where are documents
3 located?

4 And there, there were four main repositories, and we
5 had collected and produced from those repositories.

6 I agree that text messages are responsive that are on
7 personal devices, that are not on a corporate e-mail account or
8 corporate chat account, which you have a lesser expectation of
9 privacy in, court you probably have no expectation of privacy
10 in, but it's different on a personal phone, where you're,
11 you're communicating with -- not about, not about work
12 information but --

13 THE COURT: Well, the, the problem is if they're not
14 communicating about work issues on their phone, then there's
15 not going to be anything responsive on the phone. The problem
16 is if they are communicating on their personal phones, and I
17 assume, you know, you have said these are all personal phones,
18 that these aren't phones that are issued by Capital One or
19 Capital One doesn't pay -- I'm sorry, Amazon doesn't pay for,
20 you know, their service or anything like that, and there -- I
21 don't know whether there are or aren't any Amazon restrictions
22 on you shouldn't be using personal devices to communicate about
23 clients or work on your personal devices because of security
24 concerns or whatever, but, you know, I don't know what those
25 issues are, but if, in fact, they are using their personal

1 devices to conduct Amazon business and discuss issues having to
2 do with Capital One or this data breach or those kinds of
3 things, then, you know, that really isn't something that one
4 would not be expected to produce in a business environment like
5 this.

6 So that's -- and so, you know, the idea that you just
7 asked the custodians, you know, what do you, what do you
8 remember doing, without further investigation as to, well, you
9 know, what about your cell phone? Do you ever communicate
10 business-related matters by text message from your cell phone
11 devices? That -- you weren't proactive in doing that when you
12 interviewed these custodians?

13 MR. NEWBY: We have with, with some, Your Honor, but
14 not, not with all. And we have not -- I'll just be candid
15 here.

16 For some reason, I've lost your image.

17 Okay. We, we have not personally interviewed every
18 single custodian here. We have interviewed many of them, but I
19 would contest the notion that text messages are proportional
20 and an appropriate source of document collection in every case.
21 In some cases, yes. I mean, there are -- the rules of
22 discovery on proportionality don't require you to overturn
23 every stone in searching for potentially responsive
24 information.

25 In a case where it's clear employees are likely to be

1 trying to hide communications from overseers, a fraud case,
2 accounting fraud, insider trading, absolutely, but this is not
3 a case where anybody is trying to hide anything, and we
4 targeted our document collection and production to those
5 repositories that are used extensively for business purposes
6 and for communications about the Capital One account and about
7 this data security incident.

8 THE COURT: Well, again, I'm, I'm -- I'm not fully
9 understanding why you would just take the position that text
10 messages are too hard, too difficult, too much trouble to
11 search for without some meat on those bones and providing the
12 Court with some information as to what would really be required
13 to do that.

14 And it just -- it seems to be difficult for one to
15 get their hands around that if there is responsive information
16 that is a format, you have been served with a discovery request
17 that asks for that information, even if it is in that format,
18 you haven't objected -- as far as I can tell specifically, you
19 didn't object to searching for or producing text messages.

20 You have, you know, been able to search for text
21 messages in some respects at least as to nine different
22 individuals, eight custodians and one, I guess, noncustodian
23 now, and I don't -- you know, I don't -- you had to get the
24 information from the cell phones downloaded in order to do
25 that. You then could narrow it down by phone numbers, I guess,

1 for Capital One employees.

2 I don't understand why the same information that you
3 downloaded couldn't also be searched for keywords, as the
4 plaintiff has suggested here, to see what, if any, text
5 messages would be responsive.

6 You know, I -- and I don't know whether your, your --
7 you know, there may be some custodians who, you know, only use
8 their personal phone for personal devices and never send text
9 messages to, you know, customers, to internally having to do
10 with work-related business. They use either e-mail or the
11 internal communication devices, which would seem to be the
12 better business practice, but that doesn't necessarily mean
13 that you don't have the obligation to at least do something to
14 find out whether responsive documents are held and should be
15 produced.

16 MR. NEWBY: I think getting back to what I was saying
17 earlier, Your Honor, for the limited scope -- for these limited
18 number of, of custodians, eight people, just text messages with
19 Capital One, that's very narrow. We can identify -- and most
20 of them -- well, the two of them that have had any
21 communications via text message on the topics in this case, it
22 was just one person that they communicated with, and so that's,
23 that's a very simple process.

24 But looking across --

25 THE COURT: What, what did you do -- what did you

1 need to do in order to find that out from the eight custodians
2 that you have now done and got one hit on, okay? So for the,
3 the ones who were being deposed, you agreed to provide some
4 text messages from their phones.

5 As a part of that process, how did you undertake the
6 search and production of, I guess, the one text message that
7 was subject to your agreement with Cap- -- with the plaintiffs?

8 MR. NEWBY: All right. So we, we worked with our
9 in-house client, with instructions to those custodians to
10 identify all text messages with Capital One employees about a
11 list of topics, and they identified the persons within Capital
12 One that they had text messages -- that they had had text
13 messages with us -- or with -- and provided the text messages
14 to in-house counsel, who provided it to us for production.

15 THE COURT: So this was a custodian searching his or
16 own -- his or her own text messages and responding, as opposed
17 to someone getting their text messages and searching their text
18 messages?

19 MR. NEWBY: That's correct, based on detailed
20 instructions.

21 THE COURT: What follow-up was done to make sure that
22 they were being followed and doing what they had been
23 instructed to do?

24 MR. NEWBY: There was a confirmation that was
25 required from them in writing on whether they had conducted the

1 search and whether they had identified any text messages with
2 Capital One. We got written confirmations from every single
3 person.

4 THE COURT: How many of those deponents have now
5 actually been -- or proposed deponents have actually been
6 deposited?

7 MR. NEWBY: None of them have been deposited as
8 individuals. One of them was deposited as a 30(b)(6) witness.

9 THE COURT: But they're all planning to be deposited at
10 some point?

11 MR. NEWBY: Yes, Your Honor. These are all -- these
12 were all individuals on Capital One's requested deposition
13 list, and the caveat there is that one of them is a former
14 employee who's currently represented by separate counsel.

15 THE COURT: For the records that were produced, the
16 Schmidt text messages, what was the process that was done in
17 order to search his cell phone and produce those text messages?

18 MR. NEWBY: He identified to us in his communication
19 that -- he identified all text message communications with
20 Capital One about the topics that we identified in our
21 requests.

22 THE COURT: And again --

23 MR. NEWBY: And he -- I'm sorry.

24 THE COURT: Was it only with Johnson? I mean, that
25 was the only Capital One employee that he had text messages

1 with?

2 MR. NEWBY: On the topic in our -- on the topics that
3 were in our requests, which have to do with Capital One
4 security -- I'm speaking broad-brush here -- Capital One
5 security, the incident, and remediation.

6 THE COURT: Okay. Anything else before I hear from
7 plaintiffs?

8 MR. NEWBY: No. The only thing was that Mr. Schmidt
9 confirmed to us that he provided to us all of the text messages
10 that he had that met those criteria. We reviewed them and then
11 produced them in their entirety to the plaintiffs. We did not
12 withhold any.

13 THE COURT: I'll hear from plaintiffs' response to
14 what Mr. Newby has said.

15 MR. NEWBY: And, Your Honor, if I could just
16 interject before Mr. Yanchunis speaks, we, we told the
17 plaintiffs in our meet and confer that, that it had been a
18 custodial collection.

19 THE COURT: What do you mean by that?

20 MR. NEWBY: Meaning that the -- we had not imaged
21 their phones.

22 THE COURT: So it was a -- the custodians did their
23 own search of their own phones --

24 MR. NEWBY: Right.

25 THE COURT: -- and gave you the responses.

1 MR. NEWBY: Yes.

2 THE COURT: Okay. Let me hear from plaintiffs.

3 Again, you've got to take the mute off.

4 MR. YANCHUNIS: Sorry.

5 THE COURT: There you go.

6 MR. YANCHUNIS: Judge Anderson, I think you've hit an
7 issue which is one concern, is they left up to employees to
8 say: I searched my phone. I have nothing to produce.

9 That's woefully short of the obligation of the
10 defendants to engage in that search.

11 A discussion was made, and I certainly raised the
12 issue based upon a lack of knowledge, and then Mr. Newby, I
13 think, doubled down on my beliefs that you had to image the
14 phones to figure out whether or not there were text messages.

15 One of my lifelines, Mr. Webster, well known to you,
16 told me there was a search function on iPhones, that you can do
17 a search of words to ascertain whether or not there are text
18 messages with those words. You do not need to image the entire
19 phone. So it's a way in which you can circumvent any privacy
20 concerns that I addressed earlier, and, of course, we have a
21 protective order in this case.

22 So again, I, I don't need to go over those things
23 that the Court found problematic. We asked for this
24 information. It wasn't given. I assumed it was produced to
25 us, and it wasn't, again, until the deposition of a corporate

1 representative that I found out there was a text message out
2 there.

3 So again, I tried to take it in a methodical way of
4 at least having -- and again, an agreement, which was without
5 prejudice, which means I could go back without any kind of
6 repercussions to expand that, and again, through an
7 employee-only search, without any validation, it produced only
8 one additional e-mail -- or text message.

9 THE COURT: Again, that may or may not be surprising.
10 I mean, it may be that Amazon employees know that they
11 shouldn't be conducting Amazon business by text routinely, and
12 obviously, when you have the situation between Mr. Schmidt and
13 Mr. Johnson, that is, a high-level situation where you've got
14 individuals who are executive function, client development,
15 need to be in contact 24/7, those kinds of things, the idea
16 that they used texts to submit a -- does not necessarily mean
17 every rank-and-file Amazon employee is texting internally or
18 texting with other customers.

19 You know, again, you know, I'm, I'm trying to
20 understand why it is that you have the need -- and you have
21 gotten a lot of information relating to communications
22 internally at Amazon and (inaudible) issues, both e-mails and
23 the other messaging system that they have that I suspect is
24 probably a pretty robust system under the circumstances, and
25 why it is that you think having someone have to go through the

1 process of, you know, having their personal devices either
2 searched by someone else, which seems to be what you're now
3 saying that they would need to do, as opposed to them searching
4 it, I don't know whether the search function that Mr. Webster
5 is talking about is something that has to be done on a
6 single-word basis and so you have to then, you know, search for
7 "Capital" and then have to search for "One" and then you search
8 for "Capital One" or you do something like that, but, you know,
9 obviously, the range of search terms that were used to generate
10 responsive documents were electronic documents, the e-mails and
11 things like that, was certainly more expansive than one or two
12 terms and probably more than what an iPhone is -- system is
13 developed to generate a response to, but, you know, why is it
14 that one should have to go through this process only to confirm
15 your suspicions that there may or may not be information out
16 there?

17 Again, we're -- maybe we're muting you and --

18 MR. YANCHUNIS: So let's not forget that we shouldn't
19 even be here. These requests were launched. We got responses.
20 In no way do they say: By the way, we're not producing text
21 messages with employees about any of these subjects.

22 So the fact that we're here is because I found out
23 that it hadn't occurred. So we ought to be talking about
24 waiver as compared with what am I trying to find?

25 Well, I'm trying to find information in discovery

1 about the issues in this case. We're dealing with one of the
2 largest technological companies on the face of the earth. It
3 along with Google, Facebook, and maybe another one, Microsoft,
4 are technologically advanced.

5 And here we're having a colloquy without the benefit
6 of a declaration about burdensomeness, which again, one of my
7 lifelines, regardless of whether or not Mr. Webster is correct,
8 regardless of whether or not it's as easy as Mr. Webster
9 suggests, it's not my obligation to advance that. That's their
10 obligation to say you can't do it.

11 And in terms of again what's in it, Your Honor, I
12 don't know, but why is text messages, if it's a form of
13 communication with employees, any different from e-mails?
14 E-mails certainly are on the system of their employer, but we
15 know it is common for people to talk via text messages.

16 It's a quick communication that you know somebody's
17 going to get. Why? Because in this world that we live in
18 today, instead of getting letters or memos through inner office
19 correspondence, we get e-mails, and we get a bunch of them, and
20 sometimes they have a tendency to stack up. For instance, our
21 screen is only limited, so I'm sure the Court, I know all these
22 lawyers get e-mails that sometimes slip through the cracks, but
23 a text message is right on your phone. You see it. You
24 respond to it.

25 So I don't want to discount and the Court shouldn't

1 discount the fact that there may be relevant information, but I
2 don't know. It's -- it was their burden to engage in this,
3 they didn't do it, and it shouldn't be it now by having to try
4 to guess what's in it.

5 But again, the candid nature of those types of
6 communications cannot be underestimated in connection with
7 e-mail communications, where a company can monitor e-mail
8 traffic, preserve it even upon deletion. People may be less
9 guarded.

10 I think the exercise needs to occur for the -- in
11 response to the request.

12 THE COURT: Mr. Newby, what about the waiver
13 argument?

14 Again, you need to be off mute. All right.

15 MR. NEWBY: I won't -- we did not include a specific
16 objection to the definition of "documents," which includes
17 about every possible written type of document under the sun.
18 We did include a proportionality objection in our specific
19 objections that we posed, but it is not the case that a
20 defendant needs to search for every potential source of
21 documents in a case, and we targeted our search to custodians
22 and to document repositories that we believed through our, our
23 interviews were most likely to yield responsive information,
24 with proportionality in mind to move the case.

25 On the search issue, we have very complex search

1 terms in this case, a lot of negotiation with the, the other
2 side, with the plaintiffs on the search terms, and it was
3 challenging enough to run those search terms through a very
4 well-developed and advanced discovery platform with the aid of
5 an eDiscovery vendor experienced in search terms, Relativity
6 being one that's being used.

7 THE COURT: Let me just break off for a minute.
8 Mr. Toro, this is -- when I do a Zoom hearing, I handle this
9 like it would be you were in court. Leaving the screen and
10 walking around and doing those kinds of things, either you need
11 to get yourself off the video or you need to pretend like
12 you're in court. You know, it, it is very, very distracting
13 for you to be walking around, turning around, doing those kinds
14 of things.

15 So, you know, either take yourself off the video or
16 act like you're in court, okay?

17 Okay, Mr. Newby. Thank you.

18 MR. NEWBY: As I was saying, that we have
19 well-developed, heavily negotiated search terms. These are not
20 the types of search terms that can be run on an iPhone. It's,
21 it's a complex -- it was hard enough to, to do them on
22 Relativity with a lot of, a lot of negotiation.

23 THE COURT: Well, as hard as it may be for you to try
24 and do this, you know, I don't find that text messages
25 necessarily are a repository that one can ignore in responding

1 to discovery requests in this day and age, and that that should
2 be something that's either addressed in making your responses
3 or negotiated or worked out as to certain things.

4 You know, I think there is at least enough
5 information that's been presented that requires me to at least
6 take an effort to search those text message repositories to see
7 what, if any, responsive material may be in those text
8 messages.

9 You know, you need to -- and the idea that there are
10 55 of them and I think it's going to be tough doesn't satisfy a
11 burden. I mean, that just, you know, at least from me, if
12 you're going to make a proportionality argument, there has to
13 be some substance behind them and not just say it's going to be
14 hard, we don't want to do it, it's difficult, you know, there
15 are a lot of people.

16 You would have made the same argument for 55
17 custodians looking for e-mails. There are a lot of -- you
18 know, there are a lot of custodians. We have to do this, you
19 know, for 55 different custodians.

20 Well, that's, you know, that's because this is a big
21 case and there are a lot of issues involved in it. So adding
22 text messages to the mix of the repositories of potential
23 discoverable material is something that I think is, is
24 appropriate under the circumstances.

25 Not knowing the details of how that can be done, I

1 can't tell you exactly how to do that, but the idea that that
2 isn't something that should be addressed and examined and
3 looked at with each individual custodian as to whether those
4 custodians would have information that would be responsive --
5 and this is, you know, not just with Capital One. These are
6 document requests that relate to issues that are relevant to
7 the matters in this case.

8 So the narrowing to any communications with Capital
9 One, I think, is inappropriate. I think there has to be a
10 search for text messages that would be responsive in some
11 respects to the requests that have been done, and using that
12 repository to see whether there are responsive text messages.
13 You know, I, you know, based on the record in front of me,
14 that's, I think, the, the ruling that is appropriate under the
15 circumstances.

16 You know, again, I don't know what that's going to
17 require you to have to do. You know, I suspect, you know, one
18 step is to talk or to interview or find out from the custodians
19 themselves, you know, what is the universe of their text
20 messages, you know, what kind of system do they have text
21 messages that were done, do they use their -- do they send text
22 messages to other employees, do they conduct any business by
23 text messages, and if the answer to that is sometimes yes,
24 then, you know, they have to have their text messages searched.
25 Either whether it's they do it themselves or you provide them

1 with some basis to do it or you download their text messages
2 and run it through search terms, you need to figure that out.

3 But, you know, to the extent that the motion is
4 dealing with are text messages an appropriate repository for
5 one to have to look to to see whether there are responsive
6 materials, the answer to that is yes in this case, and that I
7 haven't been shown sufficient information that that would be
8 beyond the proportionality requirements of this case. Okay?

9 Anything else this morning for the plaintiffs?

10 MR. YANCHUNIS: Your Honor, thank you. Just, just
11 one other issue, and forgive me if it's been addressed already
12 in a docket entry. We sent a communication to a member of the
13 court staff about a ruling from a previous hearing and the
14 subsequent docket entry which seemed to us to be contradictory.
15 This was regarding the number of depositions under the rule.

16 THE COURT: I entered an order that day.

17 MR. YANCHUNIS: Okay. I'm sorry, Your Honor. I
18 missed that.

19 THE COURT: You know, my, my ruling on that was that
20 employees are not under parties, but, you know, the caveat to
21 that, plaintiffs need to understand, you know, there still is
22 an ability to file a motion for a protective order. So if you
23 go crazy and start trying to notice every Capital One or every
24 Amazon employee because they're not counting to the limit, you
25 know, a motion for protective order is going to be heard and

1 very well may be granted unless there's a real reason behind
2 the need to take them.

3 But the, the ruling was that parties -- that the
4 party limit, an employee does not count towards the party
5 limit. Former employees do but not employees, and I think I
6 made that clear in the order that I entered upon Ms. Zinsner
7 and -- noting that I had made an error in that order, and I
8 think it has been corrected.

9 Anything else from the plaintiffs?

10 MR. YANCHUNIS: No, Your Honor. Nothing else for the
11 plaintiffs.

12 THE COURT: Mr. Newby, anything else from Amazon?

13 MR. NEWBY: No, Your Honor.

14 THE COURT: Okay. Anything from Capital One?

15 MR. HASKINS: No, Your Honor.

16 THE COURT: Okay. Well, I guess I will see you-all
17 next week. I need to figure out what other motions that I have
18 scheduled for next Friday and then apply the timings of
19 hearings. So I generally try and put you-all at the end of the
20 docket just so that I have plenty of time to hear what, what
21 the issues are, and I suspect that will be -- I'll end up
22 putting it at the end of the docket on next Friday as well, but
23 it depends on how many other things I've got and how long I'm
24 estimating them to take.

25 So we'll get something out on Monday or Tuesday

1 letting you know what time that we'll start next Friday, okay?

2 MR. SIEGEL: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. HASKINS: Thank you for your time, Your Honor.

5 THE COURT: Thank you.

6 (Which were all the proceedings
7 had at this time.)

8

9 CERTIFICATE OF THE REPORTER

10 I certify that the foregoing is a correct transcript of
11 the record of proceedings in the above-entitled matter.

12

13

14

/s/

Anneliese J. Thomson

15

16

17

18

19

20

21

22

23

24

25